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No. 82-91

IN THE

Supreme Court of the United States

October Term, 1982

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

vs.

PADUNGSRI PHINPATHYA,

Respondent.

MOTION TO ENLARGE RECORD, SUGGESTION OF MOOTNESS AND MOTION TO STAY FURTHER PROCEEDINGS PENDING ADMINISTRATIVE ACTION.

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Respondent respectfully files this above-captioned document to inform the Court of certain important facts recent occurrence, to suggest that this cause may be moot as a result of said facts, and to request that further action of this Court be stayed pending the completion of administrative proceedings which are pending at the Board of Immigration Appeals.

I.

CERTAIN NEW FACTS SHOULD BE BROUGHT TO THE COURT'S ATTENTION AND INCLUDED IN THE RECORD.

Respondent is aware of the prohibition against referring to facts outside of the record of the proceedings below. However, in cases where new circumstances exist which

may alter the ultimate resolution of the controversy underlying the cause before this Court, it is appropriate to include the facts surrounding such circumstances in the record of this Court. *Fusari v. Steinberg*, 419 U.S. 379 (1975).

Believing that it has a duty to do so pursuant to *Fusari v. Steinberg, supra*, respondent wishes to advise the Court of the following facts:

On February 3, 1983, respondent herein filed, with the Board of Immigration Appeals, a Motion to Reopen her deportation hearing, pursuant to 8 C.F.R. § 3.2 and 8 C.F.R. § 3.8. Said motion was accompanied by an Application for Suspension of Deportation, Immigration Form 1-256A and accompanying documents. Copies of the Motion to Reopen, Application for Suspension of Deportation, and accompanying documents have been lodged with the clerk of this Court.

The motion to reopen and application allege that respondent is statutorily eligible for the relief of suspension of deportation under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(1), based on a new and material fact which has developed since respondent's last deportation hearing which was conducted on November 13, 1978. Because of the existence of a new and material fact, the motion to reopen is appropriate under 8 C.F.R. § 3.2 and 8 C.F.R. § 3.8.

The new and material fact presented to be proved at the deportation hearing, when reopened, is the continuous uninterrupted physical presence of the respondent in the United States since April 18, 1974, a period in excess of eight years in length.

Respondent alleges in her application and supporting documents and will prove at her reopened deportation hearing, that she has made no departures whatsoever since her last

arrival in the United States on April 18, 1974. Further, respondent alleges that she has been a person of good moral character and that she and her United States citizen children would suffer extreme hardship if she were deported from the United States.

On the basis of the above stated facts, respondent hereby moves this Court to enlarge the record of this case by including within it the above mentioned Motion to Reopen filed with the Board of Immigration Appeals and the accompanying Application for Suspension of Deportation and documents attached thereto.

II.

THE CAUSE PENDING BEFORE THIS COURT MAY BE MOOT.

This Court has succinctly examined the mootness doctrine in *North Carolina v. Rice*, 204 U.S. 244, 246 (1971), wherein it stated:

> ". . . [R]esolution of the question [of mootness] is essential if federal courts are to function within their constitutional sphere of authority. Early in its history, this Court held that it had no power to issue advisory opinions, *Hayburn's Case*, 2 Dall. 409 (1792), as interpreted in *Muskrat v. United States*, 219 U.S. 346, 351-353 (1911), and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. *Oil Workers Unions v. Missouri*, 361 U.S. 363, 367 (1960). To be cognizable in a federal court, a suit 'must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937). However, '[m]oot ques-

tions require no answer.' *Missouri, Kansas & Texas R. Co. v. Ferris*, 179 U.S. 602, 606 (1900). Mootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions,' *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920), quoting *California v. San Pablo & Tulare R. Co.*, 149 U.S. 308, 314 (1893); our impotence 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n. 3 (1964)"

The Article III case or controversy concept requires that an actual controversy must be extant at all stages of appellate or certiorari review and not just when the action is initiated. For that reason, the issue of mootness can be raised at any time, even for the first time, at the Supreme Court level. *DeFunis v. Odegard*, 416 U.S. 312 (1974).

Review by this Court was sought by the Immigration and Naturalization Service of one issue only. The Immigration and Naturalization Service seeks review of the finding of the United States Court of Appeals for the Ninth Circuit that respondent has satisfied the seven years continuous physical presence requirement of the Immigration and Nationality Act, Section 244, 8 U.S.C. § 1254(a)(1).

The Immigration and Nationality Act, Section 244, 8 U.S.C. § 1254(a)(1) provides for application for suspension of deportation of a deportable alien who "[1] has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, . . . [2] proves that during all such period he was and is a person of good moral character; and [3] is a person whose deportation would, in the opinion of the Attorney General result in extreme hardship to the

alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. . . ."

The Immigration Judge and the Court of Appeals both concluded that respondent satisfied the good moral character and extreme hardship requirements of 8 U.S.C. § 1254(a)(1), and the Immigration and Naturalization Service has not challenged those findings. Only respondent's fulfillment of the seven years continuous physical presence requirement is challenged.

As is clear from the record below, the issue focuses around whether respondent's departure in early 1974 was "meaningfully interruptive" of her continuous physical presence in the United States dating from October, 1969.

In light of the new facts presented in Section I above, that respondent can now prove a new seven year period of continuous physical presence in the United States which has been uninterrupted since April, 1974, and has moved the Board of Immigration Appeals to reopen her deportation hearing on the basis that she has now unquestionably satisfied all three of the statutory requirements of 8 U.S.C. § 1254(a)(1), a decision of this Court of the issue before it may not be necessary to the final disposition of respondent's deportation case.

Assuming that the Board of Immigration Appeals reopens respondent's case and that she proves the facts alleged in her application at the reopened hearing, respondent's deportation could be suspended under 8 U.S.C. § 1254(a)(1). Because of the development of these new circumstances, respondent's deportation may be suspended regardless of this Court's decision on the issue of whether her departure in 1974 was meaningfully interruptive of her earlier claimed seven year physical presence. Since this Court's decision

on the only issue before it may not be finally dispositive of respondent's deportation case, the issue for which the Immigration and Naturalization Service has sought review may be a moot question. Because the final resolution of respondent's deportation case may be reached notwithstanding a decision of this Court on the only issue before it, respondent suggests that this Court consider that it may, depending upon the decision of the Board of Immigration Appeals, lack jurisdiction to hear this cause under the doctrine of mootness.

Defunis v. Odegard, supra, involved the question of mootness in circumstances analogous to the instant case. Defunis, a law school student, had challenged the constitutionality of the law school's admissions policy, and the trial court ordered him admitted to the school. On appeal, the Washington State Supreme Court reversed and DeFunis sought Certiorari in this Court. Pending determination by the Court, Mr. Justice Douglas stayed the judgment of the State Supreme Court with the result that Defunis was in his last semester of law school when his case reached this Court. Additionally, the law school had made assurances that regardless of the outcome of the case in this Court, DeFunis would be allowed to finish law school.

This Court concluded that:

> "Because the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitations of Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties." 416 U.S. at 320.

Such was the holding of this Court notwithstanding the suggestion by dissenting justices that any number of un-

expected events might preclude DeFunis' graduation at the scheduled time.

In Footnote 5 the Court stated:

> " 'But such speculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide,' *Hall v. Beals*, 396 U.S. 45, 49 (1969), in the absence of 'evidence that this is a prospect of "immediacy and reality." ' *Golden v. Zwickler*, 394 U.S. 103, 109 (1969); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)."
>
> *DeFunis v. Odegard, supra*, at 320, note 5.

Since respondent herein may have her deportation suspended "regardless of any decision this Court might reach on the merits of this litigation"; *DeFunis v. Odegard, supra*, at 319, respondent urges that this Court consider the mootness issue in determining the appropriateness of granting a stay as requested in Section III, below.

III.

RESPONDENT REQUESTS A STAY OF FURTHER PROCEEDINGS IN THIS COURT PENDING FINAL DETERMINATION OF RESPONDENT'S MOTION TO REOPEN DEPORTATION PROCEEDINGS PENDING BEFORE THE BOARD OF IMMIGRATION APPEALS.

> "On occasion a petition for Certiorari may be held, without the Court taking any action, until some event takes place which will aid or control the determination of the matter . . . . [It may be held] until some anticipated event occurs which may make the case moot. Such postponement may come about on motion of a party (see *Murray v. City of New York*, 308 U.S. 528, 310 U.S. 610, 311 U.S. 720) or on the Court's own motion." Robert L. Stein, Eugene Gressman, *Supreme Court Practice*, at 360 (5th ed. 1978).

While the petition for Writ of Certiorari has already been granted in the present case, the reasoning of the above authorities has no less import to procedures during pendancy of Certiorari proceedings; it would be appropriate for the Court to exercise its power to issue a stay, either at the request of a party or upon its own motion, when to do otherwise would waste valuable time, energy and resources, and would ultimately result in a decision in excess of the Court's jurisdiction.

The development of new circumstances detailed in Section I above suggests that the issue for which review in this Court was sought may well be or become moot prior to a decision by this Court by reason of a decision by the Board of Immigration Appeals as discussed in Sections I and II above. If the issue is or becomes moot this Court would be devoid of Article III jurisdiction to hear the case and any further proceedings before this Court would simply be an inexpeditious use of the Court's time, with no ultimate effect on the controversy or the parties before the Court.

A stay of the type requested is appropriate because of the prejudice and hardship which would be encountered by the government, the alien and the courts if the stay is not granted. The prejudice to the government and the respondent is based on their duty to respectively prosecute and defend the case simultaneously on two fronts, namely in the Supreme Court in the instant case and also at the Board of Immigration Appeals even though a decision by the latter may preclude the necessity of a decision by the former. In addition, should this Court decide adversely to the respondent, respondent would have to seek a stay of deportation or possibly a Writ of Habeas Corpus pending the decision of the Board of Immigration Appeals.

The prejudice to the Court accrues whether its decision precedes or is subsequent to the decision of the Board of

Immigration Appeals. If the Board of Immigration Appeals' decision is first and is in respondent's favor, judicial energy will have been wasted on a moot case. Even if this Court decides first, the integrity of the Court's decision may be compromised by a later Board of Immigration Appeals decision which is controlling of respondent's actual deportation *vel non*; the controversy will not be settled until the administrative proceedings with the Board of Immigration Appeals are exhausted. This is one of the reasons for the rule requiring exhaustion of administrative remedies prior to resort to the judicial system.

On the other hand, a stay will prejudice no party's ability to proceed with the present case in this Court at a later date should the case not be rendered moot by a decision of the Board of Immigration Appeals.

The arguments expressed above are even more compelling considering the substantial likelihood of respondent prevailing at the Board of Immigration Appeals. Based upon the tripartite analysis of the factual circumstances mandated by statute (seven years continuous physical presence, good moral character, and extreme hardship) the immigration judge at the trial level found only the seven year requirement lacking. The Court of Appeals for the Ninth Circuit agreed that good moral character and extreme hardship had been established and held that the seven year requirement had also been met. The government appealed the Ninth Circuit's ruling on the seven year issue contending that the departure and return in 1974 had meaningfully interrupted the required continuous presence. Resolving that issue is the purpose of the instant case.

However, in the meantime the seven year continuous physical presence requirement has been satisfied in full with no interruptions since 1974. Coupled with the previously

established and unchallenged good moral character and extreme hardship, this factor leads respondent to believe that she will likely prevail at the Board of Immigration Appeals.

IV.
CONCLUSION.

Based upon the mootness doctrine, the concomitant jurisdictional issue, considerations of judicial economy, and the absence of prejudice to any party, as discussed above, respondent respectfully requests this Court:

(a) to enlarge the record in the instant case to include respondent's Motion to Reopen, Application for Suspension of Deportation with its supporting documents and the facts contained therein, filed and now pending with the Board of Immigration Appeals; and

(b) to stay further briefing and all further proceedings in this case pending the final decision of the Board of Immigration Appeals in respondent's deportation case.

Respectfully submitted,

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